Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF ARKANSAS ..... *Petitioner*

vs.

LARRY KENNETH BUTLER ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED

I.

WHETHER THE FOURTH AMENDMENT (AS APPLIED THROUGH THE FOURTEENTH AMENDMENT) REQUIRES THAT AN OFFICER, WHO MAKES A WARRANTLESS ENTRY OF A RESIDENCE AND ARREST OF A DEFENDANT THEREIN AS A RESULT OF A MISDEMEANOR OFFENSE COMMITTED IN THE OFFICER'S PRESENCE, HAVE EXIGENT CIRCUMSTANCES IN ADDITION TO BEING IN HOT PURSUIT OF THE DEFENDANT FOR THE ARREST TO BE LAWFUL.

II.

WHETHER THE EXCLUSIONARY RULE REQUIRES THE SUPPRESSION OF EVIDENCE OF A DEFENDANT'S CRIMINAL CONDUCT MADE IN RESPONSE TO AN ALLEGEDLY UNLAWFUL WARRANTLESS ARREST BY POLICE OFFICERS OF THE DEFENDANT IN HIS RESIDENCE.

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STATE OF ARKANSAS ..... *Petitioner*

VS.

LARRY KENNETH BUTLER ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

The State of Arkansas, the petitioner herein, respectfully prays for this Court to grant a writ of certiorari to review the judgment of the Supreme Court of Arkansas in this case.

OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported as *Butler v. State,* 309 Ark 211, 829 S.W.2d 412 (1992) and is reprinted in Appendix A attached hereto.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on May 4, 1992. The State of Arkansas' petition for rehearing was denied by the Supreme Court of Arkansas on June 1, 1992, and the notice of denial of rehearing is reprinted in Appendix B attached hereto. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

"[N]or shall any state deprive any person of life, liberty or property, without due process of law; . . ."

STATEMENT OF THE CASE

Larry Kenneth Butler, respondent herein, was charged in the Municipal Court of Springdale, Arkansas, with the misdemeanor offenses of disorderly conduct and refusal to submit to arrest. He was acquitted of the offense of disorderly conduct but was convicted of the offense of refusal to submit to arrest. He appealed his conviction to the Circuit Court of Washington County, Arkansas, and was convicted of the offense of refusal to submit to arrest for which he was sentenced to fifteen days in jail, along with a fine of $200.00 and court costs in the amount of $62.75.

Respondent appealed his case to the Supreme Court of Arkansas and argued that all evidence obtained as a result of his arrest should have been suppressed in that he was arrested in his residence without a warrant or exigent circumstances. The Supreme Court of Arkansas reversed and remanded respondent's conviction, finding that respondent's warrantless arrest inside his residence was unlawful because it was for a minor offense and without exigent circumstances. The Court also held that all evidence obtained following the illegal entry into his residence should have been suppressed.

ARGUMENT

I.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE FOURTH AMENDMENT (AS APPLIED THROUGH THE FOURTEENTH AMENDMENT) DOES NOT REQUIRE THAT AN OFFICER, WHO MAKES A WARRANTLESS ENTRY OF A RESIDENCE AND ARREST OF A DEFENDANT THEREIN AS A RESULT OF A MISDEMEANOR OFFENSE COMMITTED IN THE OFFICER'S PRESENCE, HAVE EXIGENT CIRCUMSTANCES IN ADDITION TO BEING IN HOT PURSUIT OF THE DEFENDANT FOR THE ARREST TO BE LAWFUL.

In *Butler v. State*, 309 Ark. 211, 829 S.W.2d 412 (1992), the Supreme Court of Arkansas found that the warrantless arrest of respondent inside his residence was unlawful in that no exigent circumstances requiring immediate aid or action were present. In the Court's opinion, respondent's arrest was not made lawful by the hot pursuit exigent circumstance because the arrest was for disorderly conduct, a minor offense.[1] The Court also found that all evidence obtained by police officers from the time of the illegal entry into respondent's residence should have been suppressed,

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[1]The offense of disorderly conduct is classified under Arkansas law as a Class C misdemeanor and is codified at Ark. Code Ann. § 5-71-207 (1987). The offense is punishable by imprisonment not to exceed thirty days and a fine not to exceed $100.00. Ark. Code Ann. §§ 5-4-401(b)(3) and 201(b)(3) (1987). Although respondent was acquitted of disorderly conduct, no court below ever found a lack of probable cause to arrest respondent for disorderly conduct. In order to establish probable cause for an arrest, the state need not produce the quantum of proof necessary to sustain a conviction. *Burk v. State*, 293 Ark. 374, 738 S.W.2d 399 (1987).

including respondent's conduct inside his residence constituting the misdemeanor offense of refusal to submit to arrest.[2] In reaching its decision, the Supreme Court of Arkansas relied in part on this Court's opinion in *Welsh v. Wisconsin*, 466 U.S. 70, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984), which held that a warrantless entry into a residence to arrest a defendant for driving while under the influence of intoxicants was prohibited by the Fourth Amendment to the United States Constitution.[3] Petitioner respectfully submits that the Supreme Court of Arkansas' conclusion that the Fourth Amendment prohibits a warrantless entry of a residence and arrest of a defendant therein for a misdemeanor offense previously committed in an officer's presence despite the officer's hot pursuit of the defendant is erroneous and that this Court should grant certiorari to correct this misapplication of the law. Also, as discussed *infra*, given the divergent views of jurisdictions regarding the circumstances under which an officer may make a warrantless arrest of a defendant in a residence for a minor offense, this Court, by granting certiorari, will be able to provide much needed guidance to lower courts facing this issue in the future.

In *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984), this Court was faced with the issue whether the Fourth Amendment authorized police officers to make a warrantless arrest of a defendant inside his residence

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[2]The offense of refusal to submit to arrest is classified under Arkansas law as a Class B misdemeanor and is codified at Ark. Code Ann. § 5-54-103(b)(1) (Supp. 1991). The offense is punishable by imprisonment not to exceed ninety days and a fine not to exceed $500.00. Ark. Code Ann. §§ 5-4-401(b)(2) and 201(b)(2) (1987).

[3]The Fourth Amendment is made applicable to the states through the due process clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

for a minor offense. This Court began its analysis with the well-established principle that warrantless arrests of suspects inside a residence are presumptively unreasonable. Although probable cause and exigent circumstances generally authorize a warrantless arrest of a person inside his home, this Court noted that its hesitation in finding exigent circumstances for a warrantless arrest in a home is particularly appropriate when the underlying offense for which there was probable cause to arrest is relatively minor and that when the government's intent is to make a warrantless arrest in the home for a relatively minor offense, the presumption of unreasonableness is difficult to rebut. The Court stated that the gravity of the underlying offense for which the arrest is being made is an important factor to be considered when determining whether any exigency exists.[4]

With respect to the specific fact situation in *Welsh*, this Court found that the warrantless arrest of the defendant in his home was unlawful because there were insufficient exigent circumstances authorizing the arrest for driving under the influence of intoxicants which, under state law, was a noncriminal, civil forfeiture offense for which no imprisonment was possible. No exigent circumstances were found because the police officers were not in hot pursuit of the suspect and there was little remaining threat to public safety. It was further noted that even assuming that a potential emergency existed for the state to ascertain the defendant's blood alcohol level, this alone was insufficient to uphold the warrantless arrest of the defendant in his home. Significantly,

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[4]The "gravity-of-the-crime" approach utilized in *Welsh* regarding whether a warrantless arrest of a defendant inside a residence meets the dictates of the Constitution has not escaped criticism. *See* 2 W. LaFave *Search and Seizure: A Treatise on the Fourth Amendment* § 6.1(f) (2nd ed. 1987).

this Court did not consider whether the Fourth Amendment imposed an absolute ban on warrantless home arrests for certain minor offenses. *Welsh*, 466 U.S. 740, 749 n.11. Also, this Court did not have the occasion to consider whether the defendant's warrantless arrest would have been lawful had the police officers been in hot pursuit of the defendant. Thus, *Welsh* provides no definitive answer to the question presented in the case at bar.

Since the opinion in *Welsh*, several jurisdictions have grappled with the issue of the circumstances under which police officers may lawfully effectuate a warrantless arrest of a defendant in his home for a minor offense. Specifically, courts have addressed the issue whether a warrantless arrest of a defendant inside a residence for a minor offense may be made on the basis that the offense was committed in the officer's presence and the officer was in hot pursuit of the defendant. Those jurisdictions upholding the validity of such arrests include: *In Re Lavoyne M.*, 221 Cal. App. 3d 154, 270 Cal. Rptr. 394 (4th Dist. 1990); *Lepard v. State*, 542 N.E.2d 1347 (Ind. App. 1989); *Bennett v. Coffman*, 178 W. Va. 500, 361 S.E.2d 465 (1987) (distinguishing *Welsh* on basis that hot pursuit was present and arrest was for offense for which imprisonment was authorized); *Gasset v. State*, 490 So. 2d 97 (Fla. App. 1986); *People v. Hampton*, 164 Cal. App. 3d 27, 209 Cal. Rptr. 905 (1st Dist.), *cert. denied*, 474 U.S. 825 (1985) (distinguishing *Welsh* and upholding arrest on alternative theories, including hot pursuit); *State v. Blake*, 468 N.E.2d 548 (Ind. App. 1984); *State v. Niedermeyer*, 48 Or. App. 665, 617 P.2d 911 (1980), *cert. denied*, 450 U.S. 1042, 101 S.Ct. 1761, 68 L.Ed.2d 239 (1981) (pre-*Welsh*); *State v. Penas*, 200 Neb. 387, 263 N.W.2d 835 (1978) (same). Other jurisdictions have refused to uphold the lawfulness of such arrests on the basis of hot pursuit where there were no other

exigent circumstances present. *State v. Bolte*, 115 N.J. 579, 560 A.2d 644, *cert. denied*, 493 U.S. 936 (1989); *State v. Wren*, 115 Idaho 618, 768 P.2d 1351 (Idaho App. 1989) (collecting cases); *City of Seattle v. Altschuler*, 53 Wash. App. 317, 766 P.2d 518 (1989). Still other jurisdictions have upheld warrantless arrests for minor offenses based on hot pursuit plus some other exigent circumstance. *State v. Griffith*, 61 Wash. App. 35, 808 P.2d 1171 (1991); *City of Kirksville v. Guffey*, 740 S.W.2d 227 (Mo. Ct. App. 1987), *cert. denied*, 485 U.S. 1035, 108 S.Ct. 1596, 99 L.Ed.2d 910 (1988).

This Court utilized the hot pursuit exigent circumstance in *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976), in upholding a warrantless entry and arrest of a defendant in a residence for a felony offense. There, the defendant was standing in the doorway threshold of her residence when the police attempted to effectuate the arrest. The defendant retreated into her residence at which time the officers made a warrantless entry of the residence and arrested her therein. As the officers were in hot pursuit of the defendant, they were justified in entering the residence and making the arrest without a warrant. This Court noted that "a suspect may not defeat an arrest which has been set in motion in a public place . . . by the expediency of escaping to a private place." 427 U.S. at 43.

Petitioner respectfully submits that the warrantless entry into respondent's residence to effectuate his arrest for the misdemeanor offense of disorderly conduct was lawful. The officer, who was there at respondent's request, had probable cause to believe that respondent committed the offense while both were on the front porch of the residence and it is clear that the front porch was a public place. *See United States v. Santana, supra.* The offense was committed

in the officer's presence and, as the officer was attempting to effectuate the arrest, respondent retreated into the residence. As the officer was in hot pursuit of respondent, it was proper for the officer to follow respondent into the residence to complete the arrest; otherwise, respondent simply could have defeated the arrest by taking sanctuary in a private place. *See United States v. Santana, supra.* Also, unlike *Welsh,* the officer was attempting to effectuate an arrest for disorderly conduct, an offense that, though minor, is such that imprisonment is authorized for its commission. Courts, in distinguishing *Welsh,* have found it significant that the offenses at issue in the cases before them authorized imprisonment upon their commission whereas the offense at issue in *Welsh* was a civil, nonjailable one. *See Bennett v. Coffman,* 178 W. Va. 500, 361 S.E.2d 465 (1987); *People v. Hampton,* 164 Cal. App. 3d 27, 209 Cal. Rptr. 905 (1st Dist.), *cert. denied,* 474 U.S. 825 (1985). The offense of disorderly conduct covers situations in which public peace is being threatened or disturbed and, as evinced by the legislature's authorization of imprisonment for the offense, is a matter not to be lightly regarded. In the case at bar, though the officer was not dealing with an offense for which he had to enter the residence and make the arrest in order to prevent the destruction of evidence, he was warranted in doing so to prevent any further threat to or disturbance of public peace. Requiring the officer to obtain a warrant under such circumstances is simply unjustifiable. Accordingly, this Court should reverse the judgment of the Supreme Court of Arkansas and hold that as the officer had probable cause to believe that the misdemeanor offense of disorderly conduct was being committed in his presence on the front porch of the residence, he could, utilizing the exigent circumstance of hot pursuit, make a warrantless entry of respondent's residence to effectuate the arrest therein.

II.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE EXCLUSIONARY RULE DOES NOT REQUIRE THE SUPPRESSION OF A DEFENDANT'S CRIMINAL CONDUCT MADE IN RESPONSE TO AN ALLEGEDLY UNLAWFUL ARREST BY POLICE OFFICERS OF THE DEFENDANT IN HIS RESIDENCE.

In this case, the Supreme Court of Arkansas, upon finding that respondent's warrantless arrest inside his residence was unlawful, held that the trial court erred in denying respondent's motion to suppress all evidence from the time of the illegal entry into his home. *Butler*, 309 Ark. at 212, 213-14, 217, 829 S.W.2d at 412, 413, 415. The Court noted that respondent's claim was a "federal issue." 309 Ark. at 214, 829 S.W.2d at 413. Petitioner respectfully submits this Court should grant certiorari and correct the Supreme Court of Arkansas' erroneous application of the exclusionary rule used to exclude *all evidence* obtained from the time of the police officers' illegal entry into respondent's residence, including respondent's unlawful conduct occurring within the residence in response to the entry of police officers.[5] Petitioner submits that such a sweeping application of the exclusionary rule is unwarranted.

The exclusionary rule is a judicially-developed rule whose primary purpose is to deter unconstitutional conduct

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[5]Although the Supreme Court of Arkansas did not discuss why the exclusionary rule should be invoked to suppress evidence of respondent's unlawful conduct of refusal to submit to arrest made in response to the warrantless entry of his residence, petitioner specifically argued this point in its brief and in its petition for rehearing, which was denied by the Court without written opinion.

by the police and to effectuate the guarantee of the Fourth Amendment against unreasonabble searches and seizures. *See Illinois v. Krull,* 480 U.S. 340, 347, 107 S.Ct. 1160, 1165, 94 L.Ed.2d 364 (1987); *United States v. Leon,* 468 U.S. 897, 916, 104 S.Ct. 3405, 3412, 82 L.Ed.2d 677 (1984); 1 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* §1.1(f) (2nd ed. 1987). It serves to suppress evidence obtained directly or indirectly as a result of illegal police activity. *Wong Sun v. United States,* 371 U.S. 471, 484, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963). The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. *Id.,* 371 U.S. 471, 485, 83 S.Ct. 407, 416. This Court has noted that all evidence is not subject to exclusion simply because it would not have come to light but for the illegal actions of the police; rather, such evidence is subject to exclusion where it has been obtained by exploitation of the illegality instead of by means sufficiently distinguishable to be purged of the primary taint. *Id.,* 377 U.S. 471, 477-78, 83 S.Ct. 407, 417. Also, if the government obtains the evidence from a source independent of its illegality, the evidence will not be excluded. *See Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920).

This case presents the question of under what circumstances the exclusionary rule should be invoked to suppress evidence of a defendant's unlawful conduct made in response to an allegedly unlawful arrest by police officers. In the specific context of this case, the question is whether respondent's conduct in committing the misdemeanor offense of refusal to submit to arrest should be excluded as a result of an allegedly unlawful warrantless entry and arrest occurring within his residence.

Several jurisdictions have held that a defendant cannot invoke the Fourth Amendment to exclude evidence of his own unlawful acts made in response to actions of police officers which were undertaken in violation of the amendment. *See United States v. Garcia-Jordan*, 860 F.2d 159 (5th Cir. 1988) (false statement following allegedly illegal traffic stop); *Vinyard v. United States*, 335 F.2d 176 (8th Cir.), *cert. denied*, 379 U.S. 930 (1964) (bribery of officer following allegedly unlawful arrest); *State v. Wren*, 115 Idaho 618, 768 P.2d 1351 (Idaho App. 1989) (although court found that hot pursuit exigent circumstance alone did not authorize warrantless arrest of defendant in residence for misdemeanor, court noted that exclusionary rule would not be invoked to suppress evidence of defendant's unlawful conduct toward officers in the residence); *United States v. Boilard*, 488 A.2d 1380 (Me. 1985); *State v. Mather*, 28 Wash. App. 700, 626 P.2d 44 (1981); *Ellison v. State*, 410 A.2d 519 (Del. Super. 1979); *State v. Berker*, 112 R.I. 624, 314 A.2d 11 (1974); *State v. Miller*, 282 N.C. 633, 194 S.E.2d 353 (1973); *People v. Abrams*, 48 Ill.2d 446, 271 N.E.2d 37 (1971); *but see United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978) (holding that a defendant's passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing); *State v. Hagler*, 32 N.C. App. 444, 232 S.E.2d 717 (1977); *People v. Cantor*, 36 N.Y.2d 106, 365 N.Y.S.2d 509, 324 N.E.2d 872 (1975); *see generally* 1 W. LaFave *Search and Seizure: A Treatise on the Fourth Amendment* §1.13(b) (2nd ed. 1987); 4 W. LaFave *Search and Seizure: A Treatise on the Fourth Amendment* §11.4(j) (2nd ed. 1987); 1 W. LaFave *Criminal Procedure* § 9.4(f) (1984). Evidently this Court has yet to address whether the exclusionary rule should be invoked to suppress evidence of a defendant's unlawful conduct following a constitutional violation.

In *New York v. Harris*, 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990), one of this Court's most recent decisions concerning application of the exclusionary rule to a warrantless arrest of a defendant in a residence, this Court noted that the physical entry of the home was the chief evil against which the wording of the Fourth Amendment was aimed. In *Harris*, police officers made an unlawful arrest of the defendant in his residence without a warrant or consent and subsequently obtained a confession from him at a police station after he had been administered *Miranda* warnings. This Court declined to invoke the exclusionary rule to suppress the defendant's confession because it was not obtained by exploitation of the illegal entry into the defendant's home. This Court found the situation to be similar to that in which a defendant claims that he is immune from prosecution because his person is the fruit of an illegal arrest, citing *United States v. Crews*, 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980).

Respondent submits that the primary function of the exclusionary rule, the deterrence of unlawful police conduct, would not be furthered by suppressing evidence of a defendant's refusal to submit to arrest in response to an allegedly unlawful warrantless arrest of the defendant in his residence. "As with any remedial device, application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced." *Illinois v. Krull*, 480 U.S. 340, 347, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987). As one commentator has noted, nonviolent acts of self-help are so infrequent and unpredictable that conviction would not encourage future illegal arrests and searches. Note, 8 U.C.L.A. L. Rev. 454 (1961); *cf. Ellison v. State*, 410 A.2d 519, 527 (Del. Super. 1979) ("Flight from the police is not the natural, predictable or even likely reaction of the average person who has been unconstitutionally stopped

and arrested for mere traffic offenses.") It may also be said that the exclusionary rule should not apply because the unlawful conduct of the defendant is an act of free will sufficient to purge the taint of the prior constitutional violation. *People v. Pagliari*, 47 Ill. App. 3d 708, 7 Ill. Dec. 787, 365 N.E.2d 72 (1977), *cert. denied*, 434 U.S. 1069, 98 S.Ct. 1250, 55 L.Ed.2d 772 (1978); *People v. Townes*, 41 N.Y.2d 97, 390 N.Y.S. 893, 359 N.E.2d 402 (1976). Police officers canot be said to have exploited the warantless arrest to seize evidence as a result thereof when the response to that arrest is the defendant's act of free will and his own unlawful conduct. *See People v. Puglisi*, 51 A.D.2d 695, 380 N.Y.S.2d 221 (1976). Respondent should not be effectively immunized from prosecution for his criminal act merely because that act followed an asserted Fourth Amendment violation.[6] To apply the exclusionary rule to suppress evidence of a new and distinct crime committed by the defendant in response to his unlawful arrest would give the defendant "an intolerable carte

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[6]The statute defining the offense of refusal to submit to arrest contains a provision providing that it is no defense to prosecution for the offense that the law enforcement officer lacked legal authority to make the arrest, provided he was acting under color of his official authority. *See* Ark. Code Ann. §5-54-103(b)(3) (Supp. 1991). Although the Supreme Court of Arkansas did not address the constitutionality of this provision in its opinion, the effect of the Court's opinion in suppressing evidence of respondent's unlawful conduct essentially nullified the refusal to submit to arrest statute as far as unlawful arrests are concerned. In other words, though a defendant may not technically defeat a charge of refusal to submit to arrest by claiming a defense to an unlawful arrest where he does not submit to it in some manner, he may defeat the charge by invoking the exclusionary rule to suppress his conduct such that the state is left without evidence upon which to base its prosecution, an anomaly at best. Numerous jurisdictions have abrogated a defendant's common law right to resist an unlawful arrest. *See generally* Annot., *Modern Status of Rules as to Right to Forcefully Resist Illegal Arrest*, 44 A.L.R.3d 1078 (Law. Co-op. 1972 & Supp. 1991).

blanche to commit further criminal acts so long as they are sufficiently connected to the chain of causation started by the police misconduct. The result is too far reaching and too high a price for society to pay in order to deter police misconduct." *United States v. Bailey*, 691 F.2d 1009, 1017 (11th Cir. 1982), *cert. denied*, 461 U.S. 933, 103 S.Ct. 2099, 77 L.Ed.2d 307 (1983). As the exclusionary rule should not be extended to suppress evidence of a defendant's unlawful conduct made in response to an allegedly unlawful warrantless arrest of the defendant in his residence, the judgment of the Supreme Court of Arkansas should be reversed.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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ARKANSAS ATTORNEY GENERAL

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APPENDIX A

Larry Kenneth BUTLER *v.* STATE of Arkansas

CR 91-250

Supreme Court of Arkansas
Opinion delivered May 4, 1992

Appeal from Washington Circuit Court; *William A. Storey,* Judge; reversed and remanded.

Don Lloyd Cook, for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge,* Asst. Att'y Gen., for appellee.

JACK HOLT, JR. Chief Justice. The primary issue in this case is whether the trial court erred in denying the motion of the appellant, Larry Butler, to suppress all evidence obtained from the warrantless entry of Springdale police officers into Butler's home for the purpose of arresting him on a disorderly conduct charge. We find that it did and reverse and remand.

The underlying facts of this novel situation show that on October 22, 1989, Butler called the Springdale Police Department to complain of a disturbance in his neighborhood. Officer Rusty Sudduth responded to the call. Apparently, communication between Butler and Officer Sudduth, on the front porch of Butler's home, deteriorated due to the barking and growling of Butler's dog while they were trying to talk. As a result, Butler asked his wife to call for another police officer and reentered his home; Officer Sudduth followed and told him that he was under arrest for disorderly conduct. It is disputed as to when Officer Sudduth told Butler that he was under arrest; Butler claims that Officer Sudduth told him after the officer had entered his home, and Officer Sudduth claims that he told Butler while crossing the doorway threshhold. It is not disputed that Officer Sudduth did not place Butler

under arrest while they were both on Butler's front porch.

After Butler had reentered his home, he spoke on the telephone with the Springdale Police dispatcher; shortly thereafter, Sergeant Steve Clark arrived, entered the home, and advised Butler that he was under arrest for disorderly conduct. While Butler was still talking on the telephone with the dispatcher, Officer Sudduth unplugged the telephone. Sgt. Clark placed Butler's right wrist in a wrist lock, and Officer Sudduth grasped Butler's left elbow and forearm, which was in a sling because Butler had broken his left arm. When Officer Sudduth touched Butler's left arm, Butler screamed and fell on the floor. An ambulance was called, and Butler was taken to the hospital; he was arrested upon release.

Butler was charged in the Springdale Municipal Court with disorderly conduct and refusal to submit to arrest. On June 1, 1990, Butler was found not guilty of the disorderly conduct charge and guilty on the refusal to submit to arrest charge. He was sentenced to ten days in the Springdale City Jail, fined $100.00 dollars, and assessed $52.25 in court costs.

Butler appealed to the Washington County Circuit Court, and on May 2, 1991, the trial court found him guilty of refusal to submit to arrest and sentenced him to 15 days in jail, along with a fine of $200.00 and court costs in the amount of $62.75.

Now on appeal, Butler asserts three points of error: 1) that the trial court erred in denying his motion to suppress all evidence from the time of the illegal entry into his home, 2) that the trial court erred in not holding that Ark. Code Ann. §5-54-103(b)(3) (Supp. 1991) was unconstitutional in that it is violative of the Fourth Amendment of the Constitution of the United States, and 3) that the trial court erred in allowing evidence of testimony from a municipal court trial into a *de novo* circuit court appeal and allowed the prosecutor to act

as a witness. We find Butler's first argument persuasive and reverse and remand.

As an initial matter, the State asserts that this argument is not preserved for appeal on the basis that A.R.Cr.P. 16.2(b) provides that a defendant is to make a motion to suppress evidence at least ten days in advance of the trial date, except that the court for good cause shown may entertain a motion to suppress at a later time. In this case, on the date of Butler's trial, Butler orally asked the trial court to suppress evidence of his arrest on the basis that the arrest was unlawful. The trial court took the motion under advisement pending the hearing of testimony relating to the issue. The trial commenced, and, after the close of all of the evidence, the trial court determined that once Officer Sudduth had reasonable cause to effect the arrest, he could lawfully follow Butler into his residence to effectuate the arrest. The trial court then overruled Butler's motion to suppress evidence and found that the arrest was legal under the circumstances.

We note that the State did not object at trial to Butler's motion being untimely, but instead presented all of the evidence it had in opposition to the motion. While the trial court might have raised the issue on its own, it did not do so, but heard the motion on its merits. Rule 16.2 does not mandate the denial of every motion which is untimely, and in the absence of a timely objection, we cannot conclude that the motion to suppress was not properly before the trial court or that the trial court's ruling on it was not properly preserved for review. *See Vega v. State,* 26 Ark. App. 172, 762 S.W.2d 1 (1989).

Butler's claim that the trial court erred in denying his motion to suppress all evidence from the time of the illegal entry into his home is a federal issue. *United States v. United States District Court,* 407 U.S. 297 (1972); *Johnston v. United States,* 333 U.S. 10 (1948).

We find the United States Supreme Court case of *Welsh v. Wisconsin*, 466 U.S. 740 (1984), to be instructive. In that case, the Supreme Court held that a warrantless, nighttime entry into a home to arrest an individual for driving while under the influence of an intoxicant was prohibited by the Fourth Amendment. The Court stated:

> It is axiomatic that the 'physical entry of the home' is the chief evil against which the wording of the Fourth Amendment is directed. And a principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest. It is not surprising, therefore, that the Court has recognized, as 'a basic principle of Fourth Amendment law,' that searches and seizures inside a home without a warrant are presumptively unreasonable.
>
> Consistently with these long-recognized principles, the Court decided in *Payton v. New York*, 445 U.S. 573 (1980), that warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances. . . . Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are 'few in number and carefully delineated,' when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.
>
> Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause to arrest is relatively minor. Before agents of the government may invade the sanctity of the home, the burden is on the government

to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. When the government's interest is only to arrest for a minor offense, the presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.

This is not a novel idea. Writing in concurrence in *McDonald v. United States*, 335 U.S. 451 (1948), Justice Jackson explained why a finding of exigent circumstances to justify a warrantless home entry should be severely restricted when only a minor offense has been committed:

> Even if one were to conclude that urgent circumstances might justify a forced entry without a warrant, no such emergency was present in this case. This method of law enforcement displays a shocking lack of all sense of proportion. Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it. . . . It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it. While I should be human enough to apply the letter of the law with some indulgence to officers acting to deal with threats or crimes of violence which endanger life or security, it is notable that few of the searches found by this Court to be unlawful dealt with that category of crime. . . . When an officer undertakes to act as his own

> magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant.
>
> [W]e note that it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor.
>
> We therefore conclude that the common-sense approach utilized by most lower courts is required by the Fourth Amendment prohibition on 'unreasonable searches and seizures,' and hold that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. Moreover, although no exigency is created simply because there is probable cause to believe that a serious crime has been committed, application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed.

In *Mitchell v. State*, 294 Ark. 264, 742 S.W.2d 895 (1988), we stated that in order to enter a residence or private dwelling without violation of the fourth amendment prohibition against unreasonable searches, both probable cause and exigent circumstances must be present. Exigent circumstances are those requiring immediate aid or action, and, while there is no definite list of what constitutes exigent circumstances, several established examples include the risk of removal or destruction of evidence, danger to the lives of police officers or others, and the hot pursuit of a suspect.

Arkansas Code Ann. § 5-71-207 (1987) addresses dis-

orderly conduct and provides that it is a Class C misdemeanor, which allows for imprisonment not to exceed thirty days and a fine not to exceed $100.00. Ark. Code Ann. §§ 5-4-401(b)(3) and 201(b)(3) (1987). Accordingly, in the statutory scheme of criminal offenses, the crime of disorderly conduct is a minor offense.

The State contends that the warrantless entry into Butler's home was predicated under the "hot pursuit" exception to the warrant requirement. However, even though Officer Sudduth might have been under the impression that he was in continuous pursuit of Butler for what he considered to be the crime of disorderly conduct, of which Butler was subsequently found to be not guilty, the crime is a minor offense; since the crime is a minor offense, under these circumstances there is no exigent circumstance that would allow Officer Sudduth's warrantless entry into Butler's home for what is concededly, at most, a petty disturbance. There is certainly no exigent circumstance requiring immediate aid or action; consequently, the application of the exigent circumstances exception to the requirement of a warrant for home entry in this context is, therefore, inapplicable, and the police officers' actions were unreasonable behavior that the principles of the Fourth Amendment will not sanction.

As Butler's first argument is determinative of the case, we see no need to address his remaining points of error.

Reversed and remanded.

APPENDIX B

Office of The Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals

June 1, 1992

J. Brent Standridge
Assistant Attorney General
200 Tower Building
323 Center Street
Little Rock, AR 72201

Re: CR91-250 Larry Kenneth Butler
v. State of Arkansas

Dear Mr. Standridge:

The Supreme Court made the following order in the above styled case today:

"Petition for Rehearing is denied."

/s/ Leslie W. Steen, Clerk

92-380

(2)

Supreme Court, U.S.
FILED
OCT 29 1992
OFFICE OF THE CLERK

No. 92-335

In The

Supreme Court of the United States

October Term, 1992

STATE OF ARKANSAS,

Petitioner,

vs.

LARRY KENNETH BUTLER,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Arkansas

RESPONDENT'S BRIEF IN OPPOSITION

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This Court should not grant certiorari because the Fourth Amendment (as applied through the Fourteenth Amendment) requires that exigent circumstances be present to justify a warrantless arrest within a residence. Further this case is not appropriate for determination of whether the Fourth Amendment requires that an officer have exigent circumstances in addition to being in hot pursuit of the defendant for the arrest to be lawful in that: 1.) No offense was committed in the officer's presence and; 2.) It is not clear that any hot pursuit was ever commence or whether if commenced it began in the respondent's home after the illegal entry of the officer 3

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This Court should not grant certiorari because the exclusionary rule requires the suppression of evidence which had been obtained by exploitation of the primary illegality, which occurred as a result of the decision of the arresting officer to continue, in the respondent's home, an encounter from which the respondent had already peaceably withdrawn, all evidence sought to be suppressed being during the occurrence of the illegal entry 12

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STATEMENT OF THE CASE

On October 22, 1989, Larry Kenneth Butler, the respondent herein, was arrested inside his home and charged with the offenses of disorderly conduct and refusal to submit to arrest, both misdemeanors. At trial in the Municipal Court of Springdale, Arkansas, respondent was found guilty of refusal to submit to arrest and acquitted of the charge of disorderly conduct. The conviction was appealed to the Circuit Court of Washington County, Arkansas. At trial he was convicted of the offense of refusal to submit to arrest. The sentence was fifteen days in jail, a fine in the amount of $200.00 and court costs in the amount of $62.75.

The case was appealed to the Supreme Court of Arkansas, with the respondent citing three points for reversal: 1.) that the trial court erred in denying his motion to suppress all evidence from the time of the illegal entry into his home; 2.) that the trial court erred in not holding the Arkansas refusal to submit to arrest statute unconstitutional in that it was violative of the Fourth Amendment of the Constitution of the United States; and 3.) that the trial court erred in allowing evidence of testimony from a municipal court trial into a *de novo* circuit court trial and allowed the prosecutor to act as a witness. The Court found the first argument to be persuasive and declined to rule on the other two arguments. The Court held that there were no exigent circumstances justifying warrantless entry into the respondent's home and that all evidence from the time of the illegal entry should be suppressed.

SUMMARY OF ARGUMENTS

Argument I.

Respondent argues that this Court should not grant certiorari because the ruling of the Supreme Court of Arkansas is correct. Respondent argues in essence that the Fourth Amendment as applied through the Fourteenth Amendment requires that exigent circumstances be present to justify a warrantless arrest inside the home and that the Supreme Court of Arkansas found that those circumstances were not present. Respondent further argues that for that reason that this case is inappropriate for deciding whether an officer must have exigent circumstances in addition to hot pursuit to effect a warrantless arrest inside a home. The case is inappropriate because, since the respondent was acquitted of the offense of disorderly conduct, no misdemeanor offense was committed in the officer's presence and the ruling is not clear as to whether there was a finding that there ever was any hot pursuit. If the hot pursuit did in fact exist, it started after the illegal entry into the respondent's home and as such was not an exigent circumstance justifying warrantless entry.

Argument II.

The exclusionary rule requires suppression of evidence in situations where the evidence is gained as a result of exploitation of an illegal act, in this instance the warrantless entry of the police into the respondent's home. The illegal presence of the officer represented a continuing illegality and all evidence gathered during the period of the illegality, the entire time the officer was in

the home illegally, should be suppressed. An additional consideration is the fact that the encounter between the respondent and the officer had effectively ended and the respondent had returned to his house when the officer elected to continue the encounter by entering the respondent's home. This illegal entry constituted the primary illegality which did not conclude until the officer left the house and encompassed all events that occurred during this time as suppressible evidence.

ARGUMENT

I.

THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE FOURTH AMENDMENT (AS APPLIED THROUGH THE FOURTEENTH AMENDMENT) REQUIRES THAT EXIGENT CIRCUMSTANCES BE PRESENT TO JUSTIFY A WARRANTLESS ARREST WITHIN A RESIDENCE. FURTHER THIS CASE IS NOT APPROPRIATE FOR DETERMINATION OF WHETHER THE FOURTH AMENDMENT REQUIRES THAT AN OFFICER HAVE EXIGENT CIRCUMSTANCES IN ADDITION TO BEING IN HOT PURSUIT OF THE DEFENDANT FOR THE ARREST TO BE LAWFUL IN THAT: 1.) NO OFFENSE WAS COMMITTED IN THE OFFICER'S PRESENCE AND 2.) IT IS NOT CLEAR THAT ANY HOT PURSUIT WAS EVER COMMENCED OR WHETHER IF COMMENCED, IT BEGAN IN THE DEFENDANT'S HOME AFTER THE ENTRY OF THE OFFICER.

The Petitioner's request for certiorari is predicated on a complicated set of assumptions. First, that the officer in question was actually in hot pursuit of the respondent.

Second, that said pursuit commenced outside the home of the respondent. Finally, that the Supreme Court of Arkansas found hot pursuit of the respondent existed and that since the Court found the underlying offense to be minor the hot pursuit exigent circumstance exception did not apply under the analysis in *Welsh v. Wisconsin*, 466 U.S. 70, 104 S.Ct. 2901, 80 L.Ed.2d 732 (1984). The facts and ruling in the case are simply not clear and the unique circumstances surrounding this matter weigh against it being useful in determining the circumstance under which an officer may make a warrantless arrest of a defendant in his residence. These disparate facts make the instant case distinguishable from the cases cited by respondent and rather than dispose of old controversies would result in myriad and wholly new difficulties.

A review of the pertinent parts of the Arkansas Supreme Court's ruling illustrates the respondent's basis for argument. As found on page A-1 of the petitioner's brief the Court noted:

> The underlying facts in this novel situation show that on October 22, 1989, Butler called the Springdale Police Department to complain of a disturbance in his neighborhood. Officer Rusty Sudduth responded to the call. Apparently, communication between Butler and Officer Sudduth, on the front porch of Butler's home, deteriorated due to the barking and growling of Butler's dog while there were trying to talk. As a result, Butler asked his wife to call for another officer and reentered his home; Officer Sudduth followed and told him that he was under arrest for disorderly conduct. It is disputed as to when Officer Sudduth told Butler that he was under arrest; Butler claims that Officer Sudduth told

> him after the officer had entered his home, and Officer Sudduth claims that he told Butler while crossing the doorway threshold. It is not disputed that Officer Sudduth did not place Butler under arrest while they were both on Butler's front porch.

The Arkansas Supreme Court stated in its ruling found at page A-7 of petitioner's brief:

> The State contends that the warrantless entry into Butler's home was predicated under the "hot pursuit" exception to the warrant requirement. However, even though Officer Sudduth might have been under the impression that he was in continuous pursuit of Butler for what he considered to be the crime of disorderly conduct, of which Butler was found not guilty, the crime is a minor offense; since the crime is a minor offense, under these circumstances there is no exigent circumstance that would allow Officer Sudduth's warrantless entry into Butler's home for what is concededly, at most, a petty disturbance. There is certainly no exigent circumstance requiring immediate aid or action; consequently, the application of the exigent circumstances exception to the requirement of a warrant for home entry in this context is, therefore, inapplicable, and the police officer's actions were unreasonable behavior that the principles of the Fourth Amendment will not sanction.

The Arkansas Supreme Court never made an explicit ruling on whether or not any "hot pursuit" actually existed. What the Court did say was that even if it did exist, that since the Court determined the offense to be a minor one the exigencies were not such that would justify a

warrantless entry into a residence to effect the arrest. The Court essentially found that no exigencies existed. The "hot pursuit" in the instant case, if it exists, is distinguishable from every case favorably cited by the petitioner, either by the type of pursuit, by the fact that other exigent circumstances were present, or by the underlying offense. It is worthy of note that there actually was no underlying offense in the instant case.

The petitioner cites numerous cases for the proposition that "courts have addressed the issue of whether a warrantless arrest of a defendant inside of a residence for a minor offense may be made on the basis that the officer was in hot pursuit of the defendant." Taking the version of the facts most favorable to the petitioner, the "hot pursuit" began, if at all, with the respondent well within his house and the officer crossing the threshold. No action had been taken before the respondent's reentry into his residence and the officer's subsequent entry. If "hot pursuit" can begin after a warrantless entry into a residence, then the facts alone make it distinguishable from the cases cited.

In *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976), this Court upheld a warrantless entry into the residence of an individual to make a felony arrest. In that instance the defendant retreated into her house after the police approached, identified themselves by displaying their identification and shouting "police." Clearly the individual in question understood that she was being pursued. This Court correctly noted that hot pursuit need not be "an extended hue and cry in and about [the] public streets." And that "a suspect may not defeat an arrest which has been set in motion in a public

place, . . . by the expedient of escaping to a private place." 427 U.S. at 43. In the case at bar, there is no indication that the respondent was fleeing the officer or had reason to think that he might be under any obligation to remain with the officer. Further, respondent was already in a private place, his residence, and the officer was either already inside, or at least in the threshold, when the warrantless arrest was effectuated. The other cases cited by the petitioner are similarly divergent.

The petitioner first cites three cases to support its argument: *In Re Lavoyne M.*, 221 Cal. App. 3d 154, 270 Cal. Rptr. 394 (4th Dist. 1990); *Leopard v. State*, 342 N.E.2d 1347 (Ind.App.1989); *Bennett v. Coffman*, 178 W.Va. 500, 361 S.E.2d 465 (1987); all with facts substantially different from the instant case. *In Re Lavoyne M.*, the hot pursuit was by a police car with lights and siren activated. The defendant stopped in front of his dwelling and entered, ignoring orders of police officers to stop. *Leopard* found that the defendant, followed for several blocks by a police officer, was ordered to halt outside his home and then fled inside. *Bennett* presented the situation where officers had received a disturbance call involving the defendant, had pursued him for several hours, both on the road and around the defendant's house. Additionally that Court found that the exigencies included potential destruction of evidence as well as hot pursuit. *Welsh, supra*, was distinguished in that the state court found that the underlying offense was major, the opposite conclusion reached by the state court in the instant case.

Similarly, *Gasset v. State*, 490 So.2d 97 (Fla.App. 1986) involved a high speed chase through a residential district before the defendant reached and entered his residence. Additionally, that Court found that the underlying

offense was major. The Court in *People v. Hampton*, 164 Cal. App. 3d 27, 209 Cal. Rptr. 905 (1st Dist.) *cert denied*, 474 U.S. 825 (1985) found that under a *Welsh* analysis, the underlying offense was not minor in character and further amplified their understanding of the "hot pursuit" exception to the warrant requirement in that case to apply "where the delay occasioned by obtaining a warrant would permit the escape of one suspected of a grave offense, who remains 'dangerous to life and limb.' "

The petitioner also cited a trio of cases decided before *Welsh* involving divisive facts, *State v. Blake*, 468 N.Ed.2d 548 (Ind.App. 1984); *State v. Neidermeyer*, 48 Or. App. 665, 617 P.2d 911, *cert. denied*, 450 U.S. 1042, 101 S.Ct. 1761, 68 L.Ed.2d 239 (1981); and *State v. Penas*, 200 Neb. 387, 263 N.W.2d 835 (1978). *Blake* involved the high speed pursuit of a motor vehicle prior to arrival at the defendants home. In *Neidermeyer*, the defendant was ordered to stop outside the residence and proceeded inside. Additionally, the officers had received reports that the defendant had been involved in a shooting. *Penas* likewise presented a situation where a defendant was pursued by a police officer who identified himself and ordered the defendant to stop while he was still well outside his residence.

State v. Griffith, 61 Wash. App. 35, 808 P.2d 1171 (1991) and *City of Kirksville v. Guffey*, 740 S.W.2d 227 (Mo.Ct.App. 1987) *cert. denied*, 485 U.S. 1035, 108 S.Ct. 1596, 99 L.Ed.2d 910 (1988), also cited by the respondent, present additional cases where the warrantless entry was found lawful due to exigencies in addition to "hot pursuit." In *Guffey*, the defendant engaged in a high speed car chase with law enforcement officers using siren and lights before he arrived at his residence. The *Guffey* court

further distinguished the case under *Welsh* by finding that the underlying offense was not a minor one. The court in *Griffith* noted the following circumstances: the deputy was following the defendant with flashing lights and siren; defendant was fleeing the deputy; possible destruction of evidence; and defendant was arrested for more than a minor traffic violation. Additionally the court found that the deputy never entered the defendant's house. Another case in this vein is *State v. Komoto*, 40 Wash. App. 200, 697 P.2d 1025, *cert. denied*, 474 U.S. 1021, 106 S.Ct. 572, 88 L.Ed.2d 556 (1985), not cited by the petitioner.

As noted by the petitioner, there have been numerous examples of situations where state courts have refused to find sufficient exigent circumstances based on "hot pursuit" alone. *State v. Wren*, 115 Idaho 618, 768 P.2d 1351 (Idaho App. 1989); *Jeffcoat v. Hinson*, 851 F.2d 346 (4th Cir. 1988); *McCall v. People*, 623 P.2d 397 (Colo. 1981); *People v. Day*, 165 Ill.App.3d 266, 116 Ill.Dec. 525, 519 N.E.2d 115, rev. denied, 121 Ill.2d 575, 112 Ill.Dec. 441, 526 N.Ed.2d 834 (1988); *People v. Klimek*, 101 Ill.App. 3d 1, 56 Ill.Dec. 403, 427 N.Ed.2d 598 (1981); *People v. Strelow*, 96 Mich.App. 182, 292 N.W.2d 517 (1980); *State v. Storvick*, 423 N.W.2d 398 (Minn.Ct.App. 1988); *City of Seattle v. Altschuler*, 53 Wash.App. 317, 766 P.2d 1171 (1991); and *State v. Bolte*, 115 N.J. 579, 560 A.2d 644 (1989).

As noted above, the cases cited as favorable by the petitioner are all distinguishable from the instant case. An equal, if not greater, number of cases agreed with the proposition that "hot pursuit" alone is insufficient to justify a warrantless home arrest. However, all of these cases involve situations where the issue of hot pursuit

was actually ruled upon by the state court. In the instant situation, there was never a clear ruling that any "hot pursuit" actually occurred. The Supreme Court of Arkansas' ruling makes it clear that their finding was that even if "hot pursuit" had occurred that the exigencies involved would have been insufficient to justify the officer's warrantless entry into the respondent's home. This is a very different thing than that asserted by the petitioner. Similarly, the record does not reflect that the respondent retreated into his home "as the officer was attempting to effectuate the arrest." The record presented makes it clear that the respondent was already in his home and the officer was either already inside or within the threshold area of the respondent's home when he tried to effectuate the arrest. As this Court stated in *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 66 L.Ed.2d 639 (1980): "[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton*, at 1381-1382.

The petitioner also makes the argument that even though the officer did not have a situation where destruction of evidence was a likelihood if he did not enter the home and make the arrest, that "he was warranted in doing so to prevent any further threat to or disturbance of public peace." Since the supposed disturbance, of which the respondent was later acquitted, consisted of his disagreement with the officer, it is unclear how the action of the officer in entering the house and continuing the disagreement was to "prevent any further threat to or disturbance of the peace." It would seem that the simplest course in pursuance of that goal would have been to

simply leave and let the respondent call another officer. The respondent had elected to withdraw from this encounter peaceably. The officer chose to continue the encounter by entering the respondent's home. There was no threat to the peace except that presented by continuing the encounter.

Finally, petitioner argues that under the analysis in *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984), that this case should be differentiated in that it involves an offense that provides for significant penalties, including jail time. Petitioner cites numerous cases where other state courts have made decisions under this analysis based on the finding that the crimes involved were not minor. In the instant case, the Supreme Court of Arkansas found that the underlying offense, of which the respondent was acquitted, was a minor offense under Arkansas law. While the *Welsh* case has been criticized, most notably within the Court itself, Justice Rehnquist, now Chief Justice Rehnquist, noted in his dissent in *Welsh* that "[t]he variable factor, if there is one, is the governmental interest that will be served by the warrantless entry." *Welsh*, at 761. It is highly questionable as to what the governmental interest would have been in the instant case.

The Supreme Court of the United States should refuse to grant certiorari in this case for reason that instant case does not properly delineate the issues advanced by the petitioner. There is no clear ruling at the state level whether any "hot pursuit" ever occurred, only that the exigencies present were not sufficient to justify warrantless entry into the home of the respondent to

effect an arrest for a misdemeanor. As such, it is impossible to determine whether the state court ruled that additional exigent circumstances were required, precisely the issue the petitioner wants determined. The holding of the Arkansas Supreme Court should be allowed to stand and certiorari denied.

II.

THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE EXCLUSIONARY RULE REQUIRES THE SUPPRESSION OF EVIDENCE WHICH HAS BEEN OBTAINED BY EXPLOITATION OF THE PRIMARY ILLEGALITY, WHICH OCCURRED AS A RESULT OF THE DECISION OF THE ARRESTING OFFICER TO CONTINUE, IN THE RESPONDENT'S HOME, AN ENCOUNTER FROM WHICH THE RESPONDENT HAD ALREADY PEACEABLY WITHDRAWN.

The petitioner correctly notes that the Supreme Court of Arkansas held that the initial entry of the officer into the respondent's home was unlawful. The theory is then advanced that the appellate court erred in reversing the trial court's denial of respondent's motion to suppress all evidence obtained after the officer entered respondent's home. Petitioner feels that "such a sweeping application of the exclusionary rule is unwarranted." The circumstances of this case dictate otherwise because any evidence gained was as a result of the illegal actions of the officer when he elected to enter the respondent's home.

The facts of the case indicate that after respondent had summoned the police, the respondent and Officer Sudduth became involved in a discussion that was not

proceeding to the satisfaction of either party. Both parties were on the porch of respondent's home and the respondent asked his wife to call another police officer. At that point the respondent peaceably withdrew and reentered his home. There is no evidence to suggest that he was under any duty to remain in the officer's presence. It is axiomatic in our society that when a dispute is about to occur, that we expect the parties to simply walk away. The respondent attempted to peaceably discontinue the encounter with the police officer. He simply went back into his home, the one place in our society that is traditionally free from government interference. It was the police officer who elected to continue the encounter by entering the home of the respondent, without a warrant, to effect an arrest for a misdemeanor for which the evidence was not strong enough to sustain a conviction.

Mr. Justice Jackson's observation in *McDonald v. United States*, 335 U.S. 451 (1948) noting that warrantless home entry should be severely restricted when only a minor offense has been committed seems particularly appropriate to the facts at bar.

> Even if one were to conclude that urgent circumstances might justify a forced entry without a warrant no such emergency is present in this case. This method of law enforcement displays a shocking lack of all sense of proportion. Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat on the gravity of the offense thought to be in progress as well as the hazards of the method attempting to reach it. . . . When an officer undertakes to act as his own magistrate, he ought to be in a position to justify

> it by pointing to some real, immediate and serious consequences if he postponed action to get a warrant.

McDonald, at 450-451.

The facts make it clear that there would have been no discernible consequences if the officer in question had taken the time to get a warrant in the instant case. The failure to do so resulted in the respondent's byzantine journey through the court system to defend his Fourth Amendment rights. The primary purpose of the exclusionary rule is "to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States v. Calandra*, 414 U.S. 338, 347, 94 S.Ct. 613, 619, 38 L.Ed.2d 561 (1974). *See also Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987). That protection should be paramount in a situation involving the warrantless entry into a private dwelling place. Illegal entry into a person's home is the chief evil guarded against by the Fourth Amendment. *United States v. United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). The purpose of this line of reasoning has been well articulated by this Court:

> [A] principal protection against unnecessary intrusions into private dwelling is the warrant requirement of the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest. . . . [Citations omitted] It is not surprising, therefore, that the court has recognized, as "a basic principle of Fourth Amendment law[,]" that searches and seizures inside a home without a warrant are presumptively unreasonable.

Welsh v. Wisconsin, 466 U.S. 70, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984). Citing *Payton v. New York*, 445 U.S. at 586, 100 S.Ct. at 1380. See also *Coolidge v. New Hampshire*, 403 U.S. 443, 474-475, 92 S.Ct. 2022, 2042-2043, 29 L.Ed.2d 564 (1971).

In *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) this Court defined the scope of the exclusionary rule.

> The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in *Silverman v. United States*, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed. 734, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.' Similarly testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. *McGinnis v. United States*, 1 Cir., 227 F.2d 598. Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officer's acting in the present case is no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion.

Wong Sun, at 485.

Similarly, in *United States v. Crews*, 445 U.S. 467, 100 S.Ct. 1244, 63 L.Ed. 537 (1980), this Court cited Justice Holmes opinion in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920), for the proposition that "[t]he exclusionary prohibition extends

as well to the indirect as the direct products of such invasions." This Court further noted that:

> the exclusionary sanction applies to any "fruits" of a constitutional violation – whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention.

Crews, at 471.

The Supreme Court of Arkansas did not delineate its reasons for holding that all evidence from the time of the officer's illegal entry into the respondent's home should have been suppressed. However, a basis for that reasoning is succinctly stated in the petitioner's brief. The petitioner cites *Wong Sun, supra,* that "evidence is subject to exclusion where it has been obtained by exploitation of the illegality instead of by means sufficiently distinguishable to be purged from the primary taint." All of the evidence sought to be suppressed came directly from the exploitation of the illegal conduct of the police.

In *United States v. Bailey,* 691 F.2d 1009 (11th Cir. 1982) that Court noted several factors to be considered in determining whether the evidence to be suppressed, in that case the defendant's conduct, was a product of illegal police action. Those factors included, "temporal proximity of the arrest and the defendant's response, presence or absence of intervening circumstances, and the purpose and flagrancy of the official conduct." Under this useful analysis it becomes apparent that the respondent's conduct was a direct and foreseeable consequence or product

of the illegal actions of the police. The purpose of the police in entering the house is less than clear in that the encounter between the respondent and the officer had already been peaceably terminated by the respondent. The conduct of the officer was flagrantly violative of the respondent's Fourth Amendment right to be free from an unreasonable invasion of his home by the government. The evidence sought to be suppressed was obtained during the occurrence of the primary illegality, the unwarranted presence of agents of the government. The purpose of the exclusionary rule is to protect the home by requiring exclusion of anything incriminating gathered by the police from the home. *New York v. Harris*, 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990).

This is not a case where the "chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed . . . by the original illegality." *United States v. Crews*, 445 U.S. 463, 472, 100 S.Ct. 1244, 1250, 63 L.Ed. 537. The causal chain is complete, unbroken, and very short. The original illegality was continuing and the evidence sought to be suppressed was part and parcel of the same event. While the petitioner forecasts many dire results if this decision is allowed to stand it becomes clear that the reasoning advanced by the state would allow the invasion of a private home for any reason or no reason at all, seizure of the occupant and the filing of criminal charges should he have the temerity to object, even in a passive manner. By the state's reading he would have no right to suppress this evidence since it would be an "independent act of his own free will." The only redress would be a civil action

against the vastly superior resources of the state that, even if successful, would do nothing to purge the individual of the criminal charge.

The petitioner cites a number of cases to support its position, all of which are distinguishable from the present case in some fashion. Rather than distinguish each case individually, the respondent notes that this Court has recently and forcefully stated its position regarding the suppression of evidence gained in an illegal entry. In *New York v. Harris*, this Court found that:

> Even though we decline to suppress statements made outside the home following a Payton violation, the principal incentive to obey Payton still obtains: **the police know that a warrantless entry will lead to the suppression of any evidence found or statements taken inside the home.** (Emphasis added)

Harris, at 1644.

Thus this Court has explicitly found that the police are charged with the knowledge that an illegal entry into the dwelling place of an individual in violation of the Fourth Amendment will lead to suppression of evidence. The situation in the instant case arose directly from the illegal conduct of the government's agents. The suppression of evidence in this instance does not, as the petitioner asserts, effectively immunize the respondent from prosecution for his allegedly criminal act because it followed a Fourth Amendment violation. This is a misstatement of the result. A more appropriate reasoning is found in *United States v. Blue*, 384 U.S. 251, 86 S.Ct. 1416, 16 L.Ed.2d 510 (1966):

> In some cases, of course, prosecution may be effectively foreclosed by the absence of the challenged evidence. But this contemplated consequence is the product of the exclusion of specific evidence tainted by the Fourth Amendment violation and is not the result of a complete bar to prosecution.

Blue, at 255.

The circumstance in the instant case arose as a result of an illegal and continuing violation of the respondent's Fourth Amendment rights. All the events complained of occurred during this violation. There is not a separate or defining event whereby the violation was concluded and the respondent embarked on a separate course of conduct. All evidence gained during this continuing violation should have been suppressed as the Arkansas Supreme Court so ruled. The very limited circumstances of this case will not result in the situation the respondent alludes to by citing *United States v. Bailey*, 691 F.2d 1009 (11th Cir. 1982) whereby a defendant would be granted "an intolerable carte blanche to commit further criminal acts so long as they are sufficiently connected to the chain of causation started by the police misconduct." *Bailey*, decided before either *Welsh v. Wisconsin, supra* or *New York v. Harris, supra*, involved an illegal stop in an airport, where the separate crimes were flight, and after a pursuit, an assault on an officer. The factual pattern is too disparate to make a suitable comparison with the case at bar.

Similarly, the petitioner's assertion, made in a footnote, that the ruling by the Supreme Court of Arkansas in the instant case effectively nullifies the refusal to submit to arrest law in Arkansas misses the mark. While the

respondent did attempt to have this law declared invalid by the Supreme Court of Arkansas, they declined to rule on that issue. There is no indication that this case extends to any situation other than where the primary illegality is the entry of a home in violation of the Fourth Amendment. This simply would not extend to the majority of arrests under this statute which are doubtlessly not made inside homes.

The decision of the Supreme Court of Arkansas that a motion to suppress all evidence after the illegal entry of the police into the respondent's home should be granted is correct. All the evidence to be suppressed was obtained during, and as a direct result of, a continuing illegal action on the part of the police, and as such, subject to suppression. The decision should be allowed to stand and certiorari should not be granted.

CONCLUSION

The Respondent, Larry Kenneth Butler, for all the reasons stated above, maintains that the decision of the Supreme Court of Arkansas should be allowed to stand, and certiorari should be denied.

Respectfully submitted,

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